

that the petitioner improperly utilized a Township-issued vehicle after work hours and without permission in violation of the appointing authority's rules and regulations; violated rules and regulations by transporting a citizen¹ in a Township-issued vehicle without authorization or for police purposes; failed to arrange and undergo an alcohol and/or blood test;² directed his subordinates to avoid preparing the required State accident report; purposely failed to answer questions completely and truthfully during an internal investigation; and failed to cooperate and answer all questions concerning the performance of his duties at the time of the incident.³

As a result of the WCPO's findings, the appointing authority issued a September 9, 2019 Preliminary Notice of Disciplinary Action (PNDA) which set forth the charges,⁴ and immediately suspended him without pay pending the disposition of a removal hearing. The PNDA charged the petitioner with insubordination, conduct unbecoming a public employee, misuse of public property, neglect of duty and incompetency. The PNDA advised the petitioner and his attorney that, pursuant to *N.J.A.C. 4A:2-2.5(b)*, he could provide a written response addressing the imposition of the immediate suspension without pay, that any written submission would need to be received by the Administrator of the Township by September 16, 2019, and the departmental hearing on the termination charges would be scheduled for October 8, 2019.

On September 10, 2019, the appointing authority issued Resolution 19-74, which suspended the petitioner without pay effective September 17, 2019, pending the outcome of further disciplinary proceedings. Thereafter, the petitioner, by way of a letter dated September 13, 2019, submitted a written objection to the charges. On September 16, 2019, after considering the petitioner's written objection, the appointing authority conducted a publicly noticed special meeting and passed Resolution 2019-76, which immediately suspended the petitioner without pay effective September 17, 2019 pending a removal hearing. By letters dated September 20, 2019 and December 3, 2019, the petitioner's counsel sent additional arguments to the appointing authority and to the Township Administrator, which essentially contained the same arguments presented by the petitioner in the instant matter. Moreover, the petitioner requested an adjournment of the departmental hearing that was scheduled for October 8, 2019. The hearing dates were rescheduled for February 18, 19, 20, 27, and 28, 2020, which were also not

¹ The appointing authority notes that the citizen was the petitioner's father.

² The appointing authority indicates that the petitioner admitted to drinking alcohol at the time of the incident.

³ The appointing authority notes that, prior to the February 10, 2019 incident, the petitioner was involved in a multi-jurisdictional pursuit on November 9, 2017 which was also the subject of an investigation conducted by the WCPO. In that matter, the WCPO determined that the petitioner violated the Attorney General's Police Vehicular Pursuit Policy, the appointing authority's Police Manual with respect to his conduct at the time of the incident, and the petitioner's actions placed others in danger of injury or death at the time of the incident.

⁴ The appointing authority notes that the WCPO's report was attached to the PNDA.

acceptable to the petitioner. As such, the hearing is now scheduled to commence on February 28, 2020.

In his request, the petitioner asserts that this matter should be considered as a violation of the Civil Service Act, as it was impermissible to suspend him without pay and without consideration of his constitutional and due process rights. The petitioner maintains that he was not provided the opportunity to respond to the administrative charges against him, nor was he able to respond to the Resolutions that removed him. The petitioner contends that, by letter dated September 13, 2019, he indicated to the appointing authority that he should have been suspended with pay since criminal charges were not pending against him at that time.⁵ Further, the petitioner states that he was not provided with notice of the appointing authority's meetings on September 10 and September 16, 2019 which issued the Resolutions approving his immediate suspension. As such, the petitioner maintains that his rights to a hearing were violated pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The petitioner contends that, although he sent a letter dated September 20, 2019 informing the appointing authority that his suspension without notice and a hearing violated his rights, it did not take any action in response to the letter. The petitioner now argues that, since his *Loudermill* rights were violated, he is entitled to immediate reinstatement with back pay and retroactive benefits. Additionally, the petitioner maintains that the immediate suspension was implemented prior to when the appointing authority sought a written response from him with respect to his suspension without pay. Additionally, the petitioner explains that *N.J.S.A.* 40:14-149.1 provides that a suspension with pay is required where a criminal or a quasi-criminal offense is charged as the basis of a disciplinary proceeding, unless the offense charged is especially grave or an indictment has been returned. The petitioner adds that where a charge has no criminal or quasi-criminal basis, a suspension without pay is unauthorized by law. See *Herzog v. Township of Fairfield*, 349 *N.J. Super.* 602 (App. Div. 2002). In this regard, the petitioner argues that the circumstances in this matter are not especially grave and an indictment against him has not occurred. The petitioner states that neither the charges listed in the PNDA nor the report issued by the WCPO are sufficient to warrant a suspension without pay. The petitioner adds that the appointing authority did not provide any evidence to show that he was unfit for duty, was a hazard to the citizens and the workplace, and that the suspension was necessary to maintain the safety, health, order, and effective direction of public and police services. Moreover, the petitioner contends that *N.J.S.A.* 40:14-149.1 applies to his situation and overcomes the provisions of *N.J.A.C.* 4A:2-2.5(a)1. The petitioner adds that pursuant to *N.J.S.A.* 11A:2-6(e), the Commission must interpret the Civil Service Act with respect to his immediate suspension, and must consider conducting a study, inquiry, investigation, and/or hearing to determine if his constitutional rights were violated.

⁵ The petitioner maintains that, as of September 10, 2019, he was not informed of any criminal charges against him.

Additionally, the petitioner asserts that he has a clear likelihood of success on the merits as the charges against him are unsupported, there is a danger of immediate harm, there is a complete absence of injury to the other parties, and the public interest supports granting the request. Specifically, the petitioner contends that he has been employed at the appointing authority for 22 years, possesses a spotless disciplinary record and, as such, his removal is excessive and not supported by the evidence in the record. In this regard, the petitioner explains that he was appointed to every law enforcement rank within the Police Department, and other than a separate matter which is still pending, he was not disciplined for any reason during that timeframe.⁶ The petitioner adds that he has received numerous commendations, trainings, and high level qualifications in numerous areas, which have been beneficial to citizens and the workplace. Additionally, the petitioner maintains that his actions do not constitute insubordination, as he did not refuse any orders at the time of the incident. In this regard, the petitioner explains that, at the time of the incident, he was driving his Township-issued vehicle at night, drove through the woods, brushed a guardrail, and as a result, two marked police units approached him. The petitioner asserts that the Police Officers pulled him over and he responded to their questions, and they asked the petitioner to exit the vehicle. The petitioner adds that, on the morning after the incident occurred, he reported the damage that occurred to the vehicle. Further, the petitioner maintains that his conduct does not constitute conduct unbecoming a public employee, neglect of duty, and incompetency, as he was not on duty at the time of the incident. Moreover, the petitioner contends that the appointing authority did not ask him to submit to a drug and alcohol test at the time of the incident, and if it had done so, he would have taken such a test. In this regard, the petitioner explains that the Police Officers who pulled him over at the time of the incident did not ask him to submit to a blood and alcohol test, and as such, there was no violation of any drug and alcohol policies. The petitioner also questions the report issued by the WCPO. In this regard, the petitioner contends that the report contains misrepresentations that resulted in an inaccurate conclusion. The petitioner adds that the separate pending discipline is an attempt to use the principles of progressive discipline to move forward with the removal matter in the instant case. The petitioner states that, since the charges in this matter are not sustainable, the penalty is excessive and his request in this matter should be granted.

Moreover, the petitioner argues he is in substantial danger of experiencing immediate harm in this matter, as his wife is being treated for stage 4 cervical cancer, and without his salary and health benefits to pay for her treatment, her life is at risk of irreparable harm. In this regard, the petitioner explains that his removal resulted in the loss of his health benefits. In this regard, the petitioner reiterates that the appointing authority is not currently paying him and is

⁶ The petitioner contends that the appointing authority is seeking a 60 working day suspension for a separate disciplinary matter which is still pending.

hindering his efforts to collect unemployment benefits and, as such, he is now unable to purchase health insurance coverage through COBRA. The petitioner states that any monetary damages that may be awarded in the future will not repair the damage done to his wife's health at present. The petitioner adds that he is also unable to provide healthcare for his seven-year old son. As such, he requests the Commission to intervene to correct the situation. Moreover, the petitioner argues that none of the parties would be injured if he is returned to pay status. The petitioner adds that the appointing authority is solely focused on removing him for political reasons, and as such, the public interest is best served by returning him to duty.

In response, the appointing authority, represented by Leslie A. Parikh, Esq., asserts that the petitioner is not entitled to the requested relief, and as such, his request in this matter should be denied. Specifically, the appointing authority maintains that the petitioner has failed to demonstrate that the facts presented in this matter satisfy any of the factors for interim relief. In this regard, the appointing authority explains that the petitioner will not prevail on the merits, as he was afforded all rights and provided the opportunity to respond pursuant to *Loudermill, supra*. In this regard, the appointing authority states that the petitioner, prior to the time it imposed the disciplinary action that is the subject of this matter, was provided the opportunity to respond to the suspension without pay, and in fact, has already exercised his right to be heard with respect to the removal issue. The appointing authority explains that the petitioner in this matter acknowledges that he was provided the opportunity to respond to his suspension without pay, and inaccurately claims in this matter that he did not receive proper notice or opportunity to be heard. In this regard, the appointing authority argues that the September 9, 2019 PNDA notified the petitioner that various charges were issued against him and were sustained by the WCPO. As such, the appointing authority maintains that he was properly notified of the proposed immediate suspension without pay pending the disposition of a removal hearing. It adds that the WCPO's Investigation Report was attached to the PNDA, and the petitioner was advised by way of the September 9, 2019 letter that he had the opportunity to provide a written response with respect to the immediate suspension by September 16, 2019. Therefore, the appointing authority maintains the petitioner was properly notified of the charges, the evidence in support of the charges, the immediate suspension without pay, and the proposed ultimate discipline sought. It adds that the petitioner was advised of his rights in connection with a challenge to the 60 working day suspension without pay before it was imposed, as well as his right to a hearing on the underlying administrative charges in this matter. As such, the appointing authority maintains it was in full compliance with *N.J.A.C. 4A:2-2.5(a)* and *Loudermill, supra*. Additionally, the appointing authority asserts that the September 10, 2019 Resolution memorialized that the petitioner was suspended without pay effective September 17, 2019, as his operation of the Township-issued vehicle posed a threat to the safety of the community and created a risk to the

safety, health and order of the public. As such, the appointing authority properly determined that the petitioner was a hazard and, therefore, properly suspended him prior to a hearing. The appointing authority adds that the September 10, 2019 Resolution also memorialized the petitioner's right to provide a written response addressing the immediate suspension without pay before such action was taken. In this regard, the appointing authority explains that counsel for the petitioner, in response to the Resolution, submitted the September 13, 2019 letter which set forth arguments in opposition to the suspension without pay. The appointing authority adds that, in order to protect the public, it issued the September 16, 2019 Resolution which immediately suspended the petitioner without pay.⁷ Moreover, the appointing authority explains that the WCPO recently conducted a separate investigation with respect to the petitioner's improper use of a Township-issued vehicle on another occasion, which is still pending and may result in a 60 working day suspension. The appointing authority maintains that the petitioner's due process rights were not violated, and, as such, he is not entitled to back pay, benefits, seniority and counsel fees in this matter.

Additionally, the appointing authority maintains that the petitioner's suspension without pay was proper and his assertions pertaining to *N.J.S.A.* 40A:14-149.1 are not applicable in this matter. In this regard, the appointing authority contends that the petitioner's suspension was implemented pursuant to *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-5(a)1, which provide for a suspension without pay if the employee is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain the safety, health, order or effective direction of public services. Moreover, the appointing authority asserts that, even if the provisions of *N.J.S.A.* 40A:14-149.1 are considered in this matter, it states that the Appellate Division previously determined that suspensions without pay are precluded for officers charged solely with violations of departmental rules or regulations, except where conduct equivalent to the most serious of crimes involving moral turpitude or dishonesty is supportably alleged. *See Herzog, supra.* The appointing authority explains that its Resolutions and September 9, 2019 Internal Affairs Investigation report determined that the petitioner violated the appointing authority's policies and the Attorney General's guidelines pertaining to honesty, integrity, truthfulness and cooperation during its investigation. In this regard, the appointing authority contends that it is especially egregious that the petitioner misled its investigators, failed in his duty to answer questions completely and truthfully, attempted to influence others not to take action with respect to the

⁷ The appointing authority states that it was not required to issue a "Rice" notice with respect to the September 10 and September 16, 2019 Resolutions. It contends that, when the September 9, 2019 PNDA was issued, the petitioner was put on notice of the appointing authority's proposed action. The appointing authority states that neither *N.J.S.A.* 10:4-12(b)(8) nor a "Rice" notice is necessary when a personnel matter appears on a governing agency's public meeting agenda, as the employee does not have the right to select the forum of the discussion. It adds that there was no discussion amongst the Committee members regarding the content of the Resolution before, during or after the vote.

incident, and refusal to cooperate with investigators. Moreover, the appointing authority asserts that there is no danger of immediate or irreparable harm to the appellant in this matter, as his relief is financial in nature which may be remedied if he is successful in the appeal of his removal. In this regard, the appointing authority explains that the petitioner has not demonstrated that he is experiencing immediate harm, as he has adjourned the department hearing that was originally scheduled on October 8, 2019, as well as subsequent departmental hearing dates scheduled for February 2020. It adds that the hearing dates are now scheduled for March and April 2020. The appointing authority states that any procedural deficiencies that are the subject of this matter can be cured at the time the departmental hearing occurs. Moreover, the appointing authority explains that the workplace and the public are at greater risk of experiencing injury if the petitioner is returned to duty pending a hearing.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Initially, in reviewing this matter, it is not necessary to address the merits of the underlying charges against the petitioner. Rather, the issue before the Commission in this matter is to determine if the appointing authority presented a valid basis to immediately suspend the petitioner.

N.J.S.A. 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1 provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. Further, *N.J.S.A.* 11A:2-13 states in pertinent part that before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.S.A.* 11A:2-6 is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. *N.J.A.C.* 4A:2-2.5(a) states that an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline. Additionally, where the suspension is immediate, the PNDA must be served within five days following the immediate suspension.

With regard to the requirements articulated in *Loudermill, supra, N.J.A.C. 4A:2-2.5(b)* provides, in pertinent part, that when an employee is suspended immediately and without pay, the employee must be apprised orally or in writing of why the suspension is sought, the charges and general evidence in support of the charges, and provided sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority. In a prior case addressing this issue, *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), it was found that the Township of Hamilton did not provide a proper pretermination hearing since Recine was not made aware of the charges and the general evidence supporting the charges prior to being suspended. In contrast, as set forth below, the petitioner in the instant matter was well aware of the charges against him and the general evidence in support of the charges at the time of his suspension and was afforded the opportunity to respond.

The record reflects that the petitioner was apprised in writing via the September 9, 2019 PNDA that he was immediately suspended, and subsequently by way of the September 10, 2019 and September 16, 2019 Resolutions, and was provided the basis for his suspension. Additionally, the WCPO issued a report which was attached to the PNDA indicating that the appellant did not cooperate with investigators, did not submit to a drug and alcohol test, attempted to improperly influence the Police Officers who responded to the scene of the incident, and did not immediately report the incident to the appointing authority. The specifications as indicated in the PNDA are considered the general evidence supporting the charges. The petitioner was provided with sufficient opportunity to respond, and he acknowledges in this matter that he did so. Moreover, the PNDA was served within the proper timeframe and, thus, no procedural violations occurred. Thus, the requirements of *N.J.A.C. 4A:2-2.5(b)* and *Loudermill* were met.

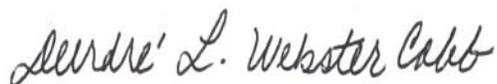
Moreover, the provisions of *N.J.A.C. 4A:2-2.5(a)1* have been met. In this regard, the information and arguments provided in support of the instant petition do not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner has actually committed the alleged infractions. In this matter, the petitioner argues that he is likely to succeed on the merits, the disciplinary penalty imposed was excessive, and he has suffered irreparable harm. The Commission notes that the charges against the petitioner are particularly serious, as they involved misuse of public property, *i.e.*, improper use of a Township-issued vehicle in a way that was a danger to the public. The charges also involve serious allegations of non-cooperation and untruthfulness. However, the Commission will not attempt to determine the propriety of the charges or the proper disciplinary penalty based on an incomplete written record. Such matters need a full plenary hearing before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses and weigh all the

evidence in the record before making an initial decision. At that point, the Commission will be in a position to decide the propriety of the recommended penalty should the charges against the petitioner be sustained. Regardless, given the serious nature of the charges, it is clear that the appointing authority met the standards for an immediate suspension enunciated in *N.J.A.C.* 4A:2-2.5(a)1. With respect to the petitioner's arguments pertaining to *N.J.S.A.* 40A:14-149.1, such arguments are misplaced, as the appointing authority is alleging, in part, that the petitioner was dishonest with respect to reporting his involvement in the incident and attempting to influence subordinate employees. Moreover, the petitioner has not shown that he is in danger of immediate or irreparable harm if this request is not granted. While the Commission sympathizes with his financial situation and his inability to pay for medical treatment, the harm that he is experiencing while awaiting his hearing is purely financial in nature, and as such, can be remedied by the granting of back pay and benefits should he prevail in his appeal. Moreover, the petitioner contends that the appointing authority would not be adversely affected if he was immediately returned to work. However, the Commission does not find this argument persuasive as it is not advisable for the appointing authority to reinstate an employee, especially one at such a high level, pending the outcome of such charges. Additionally, the petitioner's arguments with respect to his pending 60 working day suspension for a separate matter do not establish his claims in this matter. Based on the circumstances involved in the petitioner's alleged conduct, it would potentially be harmful to the appointing authority, as well as the public at large, to allow an individual facing such serious disciplinary charges to be returned to employment without the benefit of a departmental hearing, and ultimately, if necessary, a *de novo* hearing at the Office of Administrative Law. Moreover, the public is best served when a public employee facing such serious charges is kept out of the workplace pending adjudication of the charges. Accordingly, the petitioner's request for interim relief is denied.

ORDER

Therefore, it is ordered the petition for interim relief be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12th DAY OF FEBRUARY, 2020



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